

General Information Letter: Response to questions re validity of levy.

January 13, 1998

Dear:

This is in response to your letter dated November 24, 1997, regarding Department levies on funds held by an employee welfare plan. Your letter was redirected within the Department on or about December 10, 1997, to my attention. Illinois Department of Revenue (the "Department") rules require that the Department issue two types of letter rulings, private letter rulings ("PLR") and general information letters ("GIL"). PLRs are issued by the Department in response to specific taxpayer inquiries concerning the application of a tax statute or rule to a particular fact situation. A PLR is binding on the Department, but only as to the taxpayer who is the subject of the request for ruling and only to the extent the facts recited in the PLR are correct and complete. GILs do not constitute statements of agency policy that apply, interpret or prescribe the tax law and are not binding on the Department, but PLRs are binding on the Department. For your general information we have enclosed a copy of 2 Ill. Adm. Code Part 1200 regarding rulings and other information issued by the Department.

Although you have not specifically requested either type of ruling, the nature of your questions and the information you provided require that we respond with a GIL.

In your letter you state the following:

The xxxxxxxx xxxxxxxx xxx xxxxxxxxxxxx xxxxxxxx xxxxxxxx xxx has received levies on bank accounts or other assets held by a Financial Institution with respect to the above two referenced individuals. I have previously discussed this matter with Ms. xxxxxxxx who requested that I prepare a written description of the situation for referral to the Legal Department. Because the same legal issues raised in the xxxxxxx x. xxxxxxxx levy are also raised with respect to the levy regarding xxxxxxxx xxxxxxxx, I am requesting the same opinion regarding that levy.

The xxxxxxxx xxxxxxxx xxx xxxxxxxxxxxx xxxxxxxx xxxxxxxx xxx is an employee welfare plan, as that term is defined in ERISA, 29 U.S.C. Section 1002(1). The Plan receives contributions regarding the employees in question and provides the employees with a payout on December 1 of each year. The 1997 Payout date is nearing.

Both of the involved levies are phrased in terms of a levy upon assets held by a "financial institution" or "financial organization." As I understand, both levies are undertaken pursuant to the levy authority contained in 35 ILCS 5/1109. My reading of that section indicates that the Department has authority to levy upon assets held by a "financial organization, as defined in Section 1501 of this Act." 35 ILCS 5/1109. "Financial organization" is defined in 35 ILCS 5/1501(a)(8)(A) as "any bank, bank holding company, trust company, savings bank, bank holding company, trust company, savings bank, industrial bank, land bank, safe deposit company, private banker, savings and loan association, building and loan association, credit union, currency

exchange, cooperative bank, small loan company, sales finance company, investment company, or any person which is owned by a bank or bank holding company." 35 ILCS 5/1501(a)(8)(A). None of these terms encompasses an ERISA welfare plan such as the xxxxxxxx xxxxxxxxx xxx xxxxxxxxxxx xxxxxxxx xxxxxxxx xxxxx. In addition, an Illinois Attorney General's Opinion, 1991 Ill. Atty. Gen. Op. 26, No. 81-013 (March 14, 1991) states that the legislature intended to limit the Department to levies upon the types of property explicitly set forth in the involved statutes.

I understand that the Legal Department will review this matter and then respond to me in writing. I will advise the xxxxxxxx xxxxxxxxx xxx xxxxxxxxxxx xxxxxxxx xxxxxxxx xxxxx to refrain from paying the December 1, 1997 payment to either the Department or to the individuals who are subject to the Department's levy pending the response from the Legal Department.

Anti-Alienation Provision

In your letter to the Department, you described the xxxxxxxx xxxxxxxxx xxx xxxxxxxxxxx xxxxxxxx xxxxxxxx xxxxxxxx xxxxx (the Plan") as an "employee welfare plan" as that term is defined in the Employee Retirement Income Security Program ("ERISA"), 29 U.S.C. Section 1002(1). During our telephone conversation on or about December 17, 1997, you described the Plan as a program wherein the employers deduct 50 cents per hour from the employees' wages and deposit such amounts into the Plan's trust fund. The Plan pays the entire amount in the trust fund to the employees on December 1 of each calendar year. Based on these facts, the Department believes the Plan is similar to a Christmas saving club account offered by banks and other financial institutions. In essence, the Plan is a forced savings account. As such, the Department does not consider the Plan an employee welfare plan as defined in 29 U.S.C. Section 1002(1). On or about December 19, 1997, I requested a copy of the Plan agreement so that I could obtain a more accurate description of the Plan. However, as of January 2, 1997, I have not received the materials I requested. Therefore, the Department response to your letter is based on the information in your letter to the Department and the information you gave me during our telephone conversation. If you would like the Department to review this determination, please submit a copy of the Plan agreement.

Assuming that the Plan you described in your letter and during our telephone conversation does come within the definition of an employee welfare plan, the trust fund maintained by such Plan would not be exempt from garnishment, attachment or levy because ERISA does not preempt the Illinois Income Tax Act ("IITA"). ERISA preempts only those state laws that "...relate to any employee benefit plan" covered by the statute. 29 U.S.C. 1144(a). A state law "relates to" an employee benefits plan if such law has a connection with or refers to the plan. Mackey v. Lanier Collection Agency & Service, 486 U.S. 825, 829, 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988). A state law that expressly references an ERISA plan "relates to" such plan. Mackey, 486 U.S. at 830; Retirement Fund Trust of the Plumbing, Etc. et al. v. Franchise Tax Board, 909 F.2d 1266 (9th Cir. 1990). Further, a state law that purports to regulate a plan or interferes with the calculation of benefits under such plan also "relates to" the plan. Retirement Fund Trust, 909 F.2d 1266; 29 U.S.C. Section 1144(c)(2).

Section 1109 of the IITA authorizes the Department to levy upon certain assets of a taxpayer who has an outstanding Illinois personal income tax liability. Under Section 2505/39b52 of the Civil Administrative Code of Illinois, the Department may use the levy process contained in IITA Section 1109 to collect child support

amounts that have been certified as past due by the Department of Public Aid. However, the applicable sections of the IITA and the Civil Administrative Code do not contain references to ERISA plans or single out such plans for special treatment. Similarly, neither statute imposes a fee or tax on welfare plans nor do these statutes govern the operations of such plans. Therefore, as in the case of the California tax levy statute at issue in Retirement Fund Trust, neither the IITA nor the Civil Administrative Code regulates employee welfare plans. Further, the IITA does not affect the calculation of benefits payable under employee welfare plans. Instead, the IITA and the Civil Administrative Code, like the garnishment statute in Mackey and the tax levy statute in Retirement Trust Fund, merely authorize the Department to levy on amounts payable under the Plan after the amount of benefits have been determined. Therefore, the IITA and the Civil Administrative Code are neutral state laws with general application that have only tangential effects on employee benefits plans. See Retirement Fund Trust, 909 F.2d 1266. Since neither the IITA nor the Civil Administrative Code "relates to" or "purports to regulate" an employee benefits plan, such statutes are not preempted by ERISA. See Nichol v. Pullman Standard, Inc., 889 F.2d 115, 120-21 (7th Cir. 1989). Therefore, the Plan described in your letter to the Department is not exempt from the Department's levy.

Pursuant to ERISA Section 206(d)(1), pension funds are protected from assignment or alienation. 29 U.S.C. Section 1056(d)(1). However, ERISA neither expressly nor implicitly extends such protection from assignment or alienation to welfare plans. Mackey, 486 U.S. at 837. Although the trustee of an ERISA plan must execute his duties under such plan as provided for in the documents governing the plan, such documents must be consistent with ERISA. 29 U.S.C. Section 1104(a)(1)(D). Plan documents that "...create protection for the trust that Congress did not intend" are not consistent with ERISA. Retirement Fund Trust, 909 F.2d 1266. Therefore, even if the trust document for the xxxxxxxx xxxxxxxx xxx xxxxxxxxxxxx xxxxxxxx xxxxxxxx xxxxxx xxxx contains an anti-alienation provision, such provision does exempt the trust from garnishment, levy or attachment. If the provisions of ERISA were applied in any other manner the anti-alienation provision of Section 206(d)(1) and the supersedure provision of Section 514(a) would be rendered superfluous. Mackey, 486 U.S. at 837; 29 U.S.C. Sections 1056(d)(1) and 1144.

Authority of Department to Levy Upon Assets

In your letter to the Department, you expressed concerns that the Department's levy on assets held by the Plan was invalid because the Plan is not a financial organization. Section 1109 of the IITA, the first sentence of the second paragraph, authorizes the Department to levy upon assets held by a financial organization as that term is defined in IITA Section 1501(a)(8). Section 1109 of the IITA provides in part: "[i]n addition to any other provisions of this Section, any officer or employee of the Department designated in writing by the Director may levy upon the following property and rights to property belonging to a taxpayer: contractual payments, accounts and notes receivable and other evidences of debt, and interest on bonds, by serving a notice of levy on the person making such payment." The Department's levies on the assets of two Plan participants were **not** issued pursuant to the authority in the first sentence of the second paragraph of IITA Section 1109. Instead, the levies were issued under the authority provided for in the second sentence of that paragraph. The Department's authority to levy upon the property and property rights listed in the second sentence is in addition to its authority to levy upon a taxpayer's assets held by a financial organization. In fact, the second sentence of the second paragraph begins with the phrase "in addition to any other provisions of

the Section," which clearly indicates that the upcoming language expands upon the authority granted in the previous sentence. Therefore, the second sentence of the second paragraph is not a limitation or restriction on the authority granted the Department in the first sentence of that paragraph. Since the assets held by the Plan come within the meaning of the assets contained in the second sentence, the Department may levy upon such assets to satisfy a taxpayer's Illinois income tax or child support liability.

The Department realizes that the Plan is not a financial organization. However, the typically taxpayer subject to a Department levy has assets such as wages, bank accounts, interest and dividends. Most individuals maintain accounts at financial institutions and receive interest from such entities. Further, financial institutions, acting as transfer agents for corporations, also make dividend payments to individuals. Therefore, the Department uses a form entitled "Notice of Levy on Bank Accounts or Other Assets of a Taxpayer Held by a Financial Institution" to levy upon a taxpayer's assets other than wages. The title of a form is similar to the headings in a contract, it is not meant to provide the authority on which the form is based. Such authority is provided in the text of the form. Therefore, while the title of the form may not be completely descriptive, taxpayers should not rely upon the title to ignore the authority in the text of the form.

The Department is aware of Illinois Attorney General Opinion 91-013 (March 14, 1991) as that opinion was requested by a former Director of the Department. The Attorney General opined that the Director of the Department may designate certain employees to levy upon the financial assets provided for in IITA Section 1109, second paragraph. As previously stated, the Department's position is that funds held in a trust fund of an employee welfare plan come within the definition of the type of financial assets that are subject to a levy as provided for in IITA Section 1109.

Please contact the Department if you have additional questions regarding this matter.

Sincerely,

Rickey A. Walton
Staff Attorney (Income Tax)